No. 14680

In the United States Court of Appeals for the Ninth Circuit

National Labor Relations Board,

Petitioner

vs.

Texas Independent Oil Company, Inc.,

Respondent

PETITION FOR REHEARING

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AUTHORITIES

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CERTIFICATE OF SERVICE

The undersigned certifies that three copies of the Petition for Rehearing were this day served by first class mail on the following counsel at the addresses listed below:

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Dated at Phoenix, Arizona, this 15th day of May, 1956.

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PETITION FOR REHEARING

COMES NOW Texas Independent Oil Company, Inc., by its attorneys, Langmade and Sullivan, and moves for rehearing and petitions for a modification of the order directing the enforcement of the National Labor Relations Board order in the above entitled cause, first, in approving the award of back pay to Harry M. Almada, and, second, the award to E. W. Ritchins, Jr., and John E. Cox should be reduced by the amount of their earnings during the period of their suspension.

Grounds for Rehearing

In the matter of Harry M. Almada, we submit, as grounds for rehearing, the rules stated by Justice Frankfurter as to the meaning of "substantial evidence" where there is a difference of opinion between the conclusion of the Examiner, and the Board. The conclusion of the Examiner, when the evidence is re-

viewed by the Court, requires "less substantial" evidence, as the Justice expressed the rule, to sustain the findings of the Examiner. *Universal Camera Corp. v. National Labor Relations Board,* 71 Sp. Ct. Rep. 456.

In the matter of the award to E. W. Ritchins, Jr., and John E. Cox, we submit, as grounds for rehearing, the rule as stated by Justice Minton in *N.L.R.B. v. Gullett Gin Co.,* 71 Sp. Ct. Rep. 337, requiring the award to be reduced by the amount earned in other employment (except unemployment insurance payments) during the period of suspension.

Argument

HARRY M. ALMADA

In the case of Almada the Court found no error in the Board's conclusion because there appeared substantial evidence in support of "either the Examiner's or the Board's conclusion" and "not arising from credibility of witnesses". Therefore, concluded the Court, "the Board was free to draw its own conclusions".

In other words, it was not error for the Board to arrive at a different conclusion than the Examiner when the evidence was in balance.

In Almada's case, says the opinion, while the Examiner finds Almada was discharged for cause, the Board finds the cause a mere pretext because Almada exercised his right to join and assist the union.

The Board was sustained because the weight of the evidence, and the credibility of the witnesses, supported the Examiner equally with the conclusion of the Board and, therefore, the Board was sustained.

In the *Universal Camera* case, (supra) Justice Frankfurter ruled the Courts must assume a greater responsibility in reviewing labor cases for the reasonableness and fairness of the Board's decisions, and reversed Judge Hand, of the 2nd Circuit, because he failed to give credence to the Examiner's findings.

We desire to point out and compare the evidence supporting the Examiner with that supporting the Board, and request the Court to review the same, bearing in mind the rules outlined by Justice Frankfurter as a guide as to the reasonableness of the sustaining evidence.

Justice Frankfurter insists there is a duty on the Courts to review the evidence and arrive at an independent judgment. In the instant case, after reviewing the evidence, the independent conclusion reached by the Court was, all things being equal, "the Board was free to draw its own conclusions".

Before reviewing the evidence in the record, however, we wish to suggest the burden of proof is always upon the party alleging wrongdoing and, a finding by the Court that the substantial evidence is equally favorable, the complainant has not sustained the burden of proof. There is no presumption in this instance that aids one who has the burden of proof. There is no presumption that one acts illegally or unlawfully. Rather, the presumption is that all acts are done in good faith and, when there is conflicting presumptions, the presumption that one conformed to the law prevails over a presumption he acted illegally.

The Court cites, as authority for disagreeing with the respondent's proposition, that although an unfair

labor practice had been committed this did not grant immunity to an employee from being discharged for cause, the case of *Wells Inc. v. N.L.R.B.* (9th Cir) 162 Fed (2) 457.

In the *Wells* case the Court stated:

"The existence of some justifiable ground for discharge is no defense if it was not the moving cause."

We do suggest, however sound the rule, it is not applicable to the facts presented in the Almada cause. In the Wells case, the Court stated the ground for removal was not told to the employee at the time he was discharged. The Court then observed that, if he had been told the reason for his discharge at the time. "HIS DISCHARGE WAS NOT ONLY WARRANTED BUT OBLIGATORY".

Almada was told the reason for his dismissal at the time of his discharge (AR143). If the Court applied the rule in the instant case, that was applied in the Wells case, enforcement would have been denied. Enforcement was denied in the Wells case and the Board was reversed. No back pay was awarded in the Wells case and the order for reinstatement ordered by the Board was reversed.

The abstract proposition of law, quoted from the Wells case as authority in the instant case, in its application to the facts in the instant case, and as applied by the Court in the Wells case, supports the proposition advanced by this respondent.

In the *Universal Camera* case (supra) the Examiner had held the discharge was justified. Judge Hand of

the 2nd Circuit, after the Board had reversed the Examiner and applied for enforcement, upheld the Board ordering reinstatement of the discharged employee.

We believe it is significant that certiorari was granted to weigh the evidence, in view of the rule that the Supreme Court will not entertain appeals to settle N.L.R.B. controversies involving only the weight of evidence. It must have become apparent to the Supreme Court that the Courts were disregarding the purpose and responsibility Congress intended the Courts to assume in reviewing the evidence and weighing the findings and conclusions of the Examiner, when reversed by the Board, and as Justice Frankfurter observed:

> "* * * the requirement for canvassing 'the whole record' in order to ascertain in substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence."
>
> * * *
>
> "The legislative history of these acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized."
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> * * *
>
> "(5) We conclude, therefore, * * * that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past * * * The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a court of appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of the witnesses or its informed judgment on matters within its special competence or both."

Justice Frankfurter also remarked, in weighing the evidence, that the Examiner, who was present, heard the

witnesses, who had lived with the case and drawn conclusions different from the Board, was entitled to more credit; as Justice Frankfurter expressed it, the evidence "may be less substantial in support of the Examiner".

If "less substantial evidence" justifies upholding an Examiner, certainly when the substantial evidence is equal the Examiner's conclusions are entitled to the rule that the complainants have not sustained the burden of proof.

With the legal principles outlined by Justice Frankfurter in the *Universal Camera* case as a guide, we would like to compare the "substantial evidence", as found by the Examiner, with the "substantial evidence" found by the Board, which the Court, in its opinion in the instant case, says is equal. Please observe in comparing the reasonableness of the two findings that the Examiner states facts while the Board confuses facts with opinions. The Examiner stated, (AR 82-83):

> "Almada violated the company rule as to bumping tires, burned up a tire on the road, and endangered $30,000 worth of the company's equipment. It is likewise undisputed that after Quisenberry saw how badly the tire was burned, and learned it had been left on the desert because it was too hot for the tire rack of the truck, that he phoned Almada and discharged him."

> "On all the evidence in this case, I find that this tire was burned and the equipment endangered because Almada had not bumped his tires as required by the company rules. I find that the positive proof that the tire was burned, coupled with Quisenberry's testimony on this point which I credit, outweighs the inference from Quisenberry's anti-union conduct. I

find, therefore, that Almada was discharged for cause."

The Board found: (AR 101)

"We are unable to agree with the Trial Examiner that Almada was discharged for cause. Almada had not violated the respondent's rule about bumping tires. Moreover, the evidence shows that the burning of a tire is an occasional business hazard and did not deter the respondent from replacing Almada with a non-union driver who had previously burned tires on at least two occasions. In view of the respondent's other unlawful conduct, we accordingly find that the respondent's manager, Quisenberry, discharged Almada for exercising his protected right to join and assist the union."

The Board's statement that Almada did not violate the company's rule is not supported by the evidence. Almada admitted the rule himself. This statement, therefore, is untrue. The Board's statement that the "evidence" shows the burning of a tire is a business hazard is also untrue. There is no "evidence" in the record stating it a business hazard. The first time the expression was used was by the Board in expressing its opinion. The Board's statement that a non-union man was used to replace Almada was true but a finding he had not been discharged by the respondent although he had burned two tires is not true. The tires were not burned when he worked for respondent. The Board set forth four findings (AR 101), quoted in full above, for its conclusions. In support of the first finding, the rule about bumping tires, we invite the Court's attention to the evidence in the record. Almada testified (AR 147) (149):

"He (meaning Quisenberry) said to bump the tires every 60 miles."

"Then you hadn't bumped your tires for a period of approximately 80 miles?"

"No, I hadn't."

Although the Board found a rule had not been violated, the witness himself so admitted, and we ask, does the record support the Board or the Examiner, and is a witness bound by his own admissions?

In support of the finding that the "evidence showed" the burning of a tire to be a business hazard, we have searched the record and find there is no evidence or suggestion by any witness that the burning of a tire is a business hazard. We suggest this finding is not supported by evidence.

The next "finding" by the Board that Wallsmith, a non-union man, who had not been discharged for burning two tires, was used to replace Almada who had burned only one. We set forth the entire Wallsmith testimony in our response, which we again invite the Court to read, to establish that only part of the finding is true. Wallsmith was non-union, which he admitted. His statement was filed with the Board, on a petition for rehearing, that the respondent had no knowledge of his having burned two tires. The evidence shows Wallsmith, in his twenty years labor as a truck driver before working for the respondent, had burned only two tires, which he admitted was cause for discharge. Evidence of which the respondent had no knowledge certainly does not establish an ulterior motive. The respondent had no knowledge of two tires having been

burned; Wallsmith certainly had not burned two tires while in the employ of the respondent, and the record has no evidence that two tires were burned by Wallsmith while in respondent's service.

The fourth and last ground charged by the Board as the "moving cause" for discharge was the "respondent's other unlawful conduct".

The Examiner found (AR 152) that Almada was duly notified at the time he was discharged and given the reason for his suspension:

> "He called Almada before he made his next run and said 'Harry I'm going to have to let you go because of that tire'. Almada said, 'I take it I'm fired for union activities'. He said, 'No, Harry, you are fired because you burned up a tire and left it lay beside the road because it was so damn hot you couldn't get it back on the tire rack."

This statement made to Almada at the time of his discharge removes the unlawful conduct charge referred to by the Court in the Wells case (supra). There the employee was not given the reason for his discharge at the time of suspension. The Court found in that case if the reason for discharge has been told the employee at the time, the discharge would have been warranted.

The other "unlawful conduct", referred to by the Board as the moving cause for Almada's discharge, consists, of course, of what the Board considers "unfair labor practices" by Quisenberry. In support of our legal proposition that, when grounds for discharge exist, activities protected by Section 7 of the Act will not insulate an employee from being discharged for cause,

we invite the Court's attention to the rules adopted by a few of the many Circuit Court opinions, as follows:

National Labor Rel. Bd. v. Huber & Huber Motor Exp., 223 Fed. Rep. (2d); 748.

Where a legal ground for discharge existed—as it did in this case—and the employee was discharged on that ground alone, obnoxious conduct on his part, in an activity protected by Section 7 of the Act, will not insulate him from being discharged on such legal ground.

Considered as a whole, the record in this case does not support the Board's petition for a decree for enforcement and accordingly the petition is denied.

National Labor Rel. Bd. v. Houston Chronicle Pub. Co., 211 F. 2d 848, at 854, 855.

When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible of being misunderstood and hard to prove or to disprove. If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is evidence possessed of genuine substance. In our opinion this is not such a case.

National Labor Rel. Bd. v. American Thread Co. 210, F. 2d 381, at 383.

(1) Specifically we are in no doubt that the evidence completely fails to support the finding that

William Robinson was discharged because of his membership in, and activity on behalf of, the union. On the contrary, it shows without contradiction or dispute that he was discharged for open and continuous insubordination and disobedience of orders, and the order requiring his reinstatement with back pay is itself an unfair labor practice and as such is prohibited by Section 10(c) of the act which provides, "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged * * * for cause * * * ", 29 U.S.C.A. §160 (c).

National Labor Rel. Bd. v. Blue Bell
219 F. 2d, 796, at 798, 799.

(7) Where the employer has proper cause for discharging an employee, the Board may not rely on scant evidence and repeated inferences to make a finding that places the Board in the position of substituting its own ideas of business management for those of the employer. Considered as a whole, the record in this case does not support the Board's petition for a decree of enforcement, and accordingly the petition is denied. Universal Camera Corp. v. N.L. R.B., 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456.

Enforcement denied.

The interrogation of employees, statements made by supervisors and the threats to close up business, and other unfair labor practices, shown in the above reported cases, did not deny an employer the rights guaranteed by Section 10(c) of the Act.

Almada's complaint as to why he was discriminated against, and that the burning of the tire was merely a pretext for his discharge, is set forth in his direct testimony, AR pages 121 to 155 inc.

It should be noted Quisenberry did not discharge Almada when, over the telephone, Almada first told him he had burned the tire and he expressed the hope it would not get him in trouble, (AR 143). Quisenberry replied he would first look at it and it was only after an examination of the circumstances, and confirming that Almada had violated the rules of the company and endangered the $30,000 investment of his employer, that he acted. Almada wasn't worrying about being discharged for his union affiliation at the time he reported the burning of the tire. The discharge became discriminatory as an afterthought. The "unlawful" conduct that insulated Almada from being discharged for cause, it is claimed, consisted entirely of conversations had with Quisenberry. First, before he was actually an employee, and before it became unfair to speak, "he questioned me as to whether I belonged to a union." Notwithstanding Almada's reply that he was a union member, he was actually employed and given much greater authority by being authorized to recommend others to be employed. True, Quisenberry told him he didn't want any union trouble (who does) and that he wanted the men to defer organizing until they "got rolling." Almada also said that Quisenberry said that the 'Old Man' said he wouldn't put up with it. After Almada was employed, and when free speech becomes limited, Quisenberry explained to Almada how he had belonged to a union once and he thought it had held him back, and his philosophy about unions, but this conversation contained no threats. There was another conversation, several weeks later and several weeks before he burned the tire, involving a reported statement made by 'The Old Man.' (AR 135). Almada testified that Quisenberry said that the old man said he was mad at him and to get rid of a certain man, meaning

Almada. Someone said that Nixon said that Harry Truman was a traitor, yet Harry Truman was not indicted or convicted. The rules of evidence in a French court might have honored what Almada said that Quisenberry said that Horace Steele said, but the Taft-Hartley Act preserved the rules of evidence observed in the United States District Courts.

Again there was another conversation in which Quisenberry said (AR 136) that Fred Bone, a union man, had said that Almada "was a staunch union supporter, and that I would follow whatever the union told me." This made Almada so mad he called Fred Bone on the telephone and Bone said he never said any such thing. Almada resented, after telling Quisenberry he wouldn't create any disturbance, that Quisenberry would question his integrity, and the whole story falls flat because it is a statement of what Almada said that Quisenberry said that Fred Bone said, that Fred Bone denied.

The above are the principal conversations referred to as unlawful conduct on the part of the respondent in the Almada case. The other conversations related to Ritchins and Cox, that Almada said that Quisenberry said, and were carried on between the two as the usual bickerings between employees, over which the management had no control. Whatever may have been said, or denied to have been said, did not relate to Almada's union activities; in fact, Almada did not instigate, and there is no evidence that he instigated, any union activities. It is not "unlawful conduct" to hold opinions. Much emphasis was placed on the "antipathy" of Quisenberry because of his beliefs. There are many employers that have an "antipathy" against

unions, just as union men have an "antipathy" against management.

As was said by Justice Rives in *N. L. R. B.* v. *Houston Chronicle* (supra), "if an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise is on its way out." People have not yet been convicted for holding opinions. Anthony Eden, according to the press reports, congratulated himself on a diplomatic victory in his last confab with B & K because they pledged to assist him in securing the release of some two hundred Czechoslovaks imprisoned for their opinions. Perhaps that is what the Court meant in the Houston Chronicle case, that we had not yet reached the point where we condemned men for holding opinions, and that all who did not conform were improperly motivated in their dealings with their fellow men.

E. W. RITCHINS, JR., AND JOHN E. COX

The Board did not reduce the earnings of these two employees during the period of their suspension by the amount of their earnings in other employment.

Ritchins earned $398.33 in other employment in excess of what he would have earned had he worked continuously for the respondent.

Cox earned $481.13 in other employment in excess of what he would have earned had he worked continuously for the respondent.

We raised this issue before the Board and called it to the Court's attention in our response.

We submit the case should be remanded for the purpose of giving credit to the respondent for the amount earned in accordance with the Act, and as the Supreme Court has interpreted the Act in *N. L. R. B.* v. *Gullett Gin Co.*, 71 Sp. Ct. Rep. 337.

Respectfully submitted,

LANGMADE and SULLIVAN

By Stephen W. Langmade
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Certificate of Merit

In conformity with Rule 23, this is to certify that in my judgment the grounds for rehearing are well founded and declare it is not filed for delay.

DATED at Phoenix, Arizona, this 15th day of May, 1956.

Stephen W. Langmade
of Attorneys for Respondent